

# Memorandum



**Date:** January 22, 2014

**To:** Honorable Chairwoman Rebeca Sosa  
and Members, Board of County Commissioners

**From:** Carlos A. Gimenez  
Mayor

Supplement  
Agenda Item No. 8(F)(12)

**Subject:** Supplement to Contract Award Recommendation for Contract No. RFP851,  
Misdemeanor Diversion Services

This supplement is to report that a bid protest was filed with the Clerk of the Board on December 2, 2013 by Miami Dade Community Services, Inc. (MDCS). In accordance with the bid protest procedures, as set forth in Section 2-8.4 of the Code of Miami-Dade County and Implementing Order 3-21, a Hearing Examiner was appointed and a hearing was conducted on December 23, 2013. The Hearing Examiner upheld the Mayor's contract award recommendation.

## Background

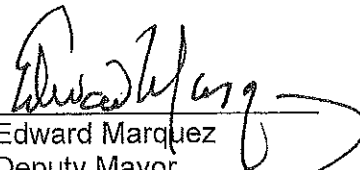
The solicitation was advertised on March 1, 2012 and allowed for the selection of up to three firms to provide Misdemeanor Diversion Services. Six proposals were received in response to the solicitation. Following the evaluation of proposals by the Evaluation/Selection Committee (Committee), four firms (Advocate Program, Inc.; Court Options, Inc.; Judicial Corrections Services, Inc.; and National Corrective Group, Inc. dba Corrective Solutions) were recommended for oral presentations. Upon completion of the oral presentations, the Committee re-evaluated, re-rated, and re-ranked the proposals, based upon the written documents combined with the oral presentations. The Committee recommended the two highest-ranked firms, Advocate Program, Inc. and Court Options, Inc. for negotiations. Negotiations were successfully completed with both firms on August 7, 2013. The negotiations team unanimously agreed that Advocate Program, Inc. and Court Options, Inc. should be recommended for award.

MDCS, one of the original six proposers, protested the award recommendation of this contract to Advocate Program, Inc. and Court Options, Inc. The claim in the MDCS protest is that the procurement process was tainted by a Committee member's apparent bias towards one vendor and there were related Sunshine Law violations.

Based upon the law and facts brought forward in the proceedings, Hearing Officer Marc A. Douthit recommends that the Notice of Intent to Award dated November 25, 2013 be upheld and that the bid for RFP 851, Misdemeanor Diversion Services be awarded to the Advocate Program, Inc. and Court Options, Inc.

Copies of the MDCS protest, and the Hearing Examiner's Report are attached.

Attachment

  
Edward Marquez  
Deputy Mayor



Harvey Ruvlin  
CLERK OF THE CIRCUIT AND COUNTY COURTS  
Miami-Dade County, Florida

CLERK OF THE BOARD OF COUNTY COMMISSIONERS  
STEPHEN P. CLARK MIAMI-DADE GOVERNMENT CENTER  
SUITE 17-202  
111 N.W. 1st Street  
Miami, FL 33128-1983  
Telephone: (305) 375-5126

January 8, 2014

Eduardo S. Lombard, Esq.  
Vezina, Lawrence & Piscitelli, P.A.  
The Walker-Lee House  
413 East Park Avenue  
Tallahassee, Florida 32301

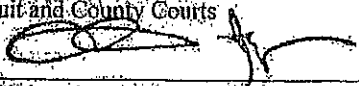
Re: Bid Protest - RFP No. 851  
Misdemeanor Diversion Services  
(Protester: Miami Dade Community Services, Inc.)

Dear Mr. Lombard:

Pursuant to Section 2-8.4 of the Code and Implementing Order 3-21, forwarded for your information is a copy of the Findings and Recommendation filed by Attorney Marc Anthony Douthitt, Hearing Examiner, in connection with the foregoing bid protest hearing which took place on December 23, 2013.

Should you have any questions regarding this matter, please do not hesitate to contact this office.

Sincerely,  
HARVEY RUVIN, Clerk  
Circuit and County Courts

By   
Christopher Agrippa, Division Chief  
Clerk of the Board Division

CA/fed  
Attachment

Eduardo S. Lombard, Esq.  
Vezina, Lawrence & Piscitelli, P.A.  
Page Two  
January 8, 2014

cc: Honorable Chirwonan Rebeca Sosa and  
Members, Miami-Dade County Board of County Commissioners (via email)  
Honorable Carlos A. Gimenez, Mayor, Miami-Dade County (via email)  
R.A. Cuevas, County Attorney (via email)  
Hugo Benitez, Assistant County Attorney (via email)  
Oren Rosenthal, Assistant County Attorney (via email)  
Jenelle Snyder, County Attorney's Office (via email)  
Rita Gonzalez, County Attorney's Office (via email)  
Ginny Bass, County Attorney's Office (via email)  
Charles Anderson, Commission Auditor (via email)  
Elizabeth Owens, BCC Legislative Analyst, Commission Auditor's Office (via email)  
Lester Sofa, Director, Internal Services Department (via email)  
Edward Marquez, Deputy Mayor (via email)  
Miriam Singer, CPPC, Assistant Director, Internal Services Department (via email)  
Amos Roundtree, Director, Purchasing Department, Internal Services Department (via email)  
Walter Fogarty, Manager, Procurement Vendor Services, Internal Services Department (via email)  
Ray Baker, Assistant to the Director, Internal Services Department (via email)  
Pearl P. Belfiel, Procurement Contracting Officer 2, Internal Services Department (via email)  
Advocate Program, Inc.  
Court Options, Inc.  
Judicial Correction Services  
National Correction Group, Inc. d/b/a Corrective Solutions  
Professional Probation Services, Inc.  
Miami Dade Community Services, Inc.

**DOUTHIT LAW, LLC**  
**6255 Miami Lakes Blvd.**  
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**Miami Lakes, FL 33014**  
**(786) 594-3977 (305) 503-9633 Fax**

CLERK OF THE BOARD

2014 JAN -8 AM 9:41

CLERK, CIRCUIT & COUNTY CTC  
MIAMI-DADE COUNTY, FLA.  
#1

December 31, 2013

TO: Clerk of the Board  
FROM: Marc Anthony Douthit, Esq.  
RE: Bid Protest-Project No. 851 Misdemeanor Diversion Services

MEMORANDUM OPINION AND RECOMMENDATION

This matter came before this Hearing Examiner on December 23, 2013 on the Bid Protest of Miami Dade Community Service, Inc.'s (MDCS), protesting Miami-Dade County's Recommendation of Award, dated November 25, 2013, for the award of Project Number 851 to provide Misdemeanor Diversion Services (RFP) to the successful bidders, the Advocate Program, Inc. (Advocate Program) and Court Options, Inc. (Court Options). Both the Advocate Program and Court Options sought leave to intervene in this matter arguing that the outcome of these proceedings could fundamentally affect their interests in the outcome of the Request for Proposal. Counsel for MDCS argued that the intervention of the Advocate Program and Court Options was improper since the Miami-Dade County Code does not specifically provide for the intervention of third parties and the successful bidders should not be heard in this matter. In other contexts,

intervention is found to be appropriate when the fundamental interest of a party is affected by the outcome of the proceedings *Barnhill v. Florida Microsoft Litigation*, 905 So.2d 195, 199 (3rd DCA 2005). Under these circumstances, I believe that allowing intervention is a reasonable position to take since to do otherwise would render the intervenors spectators to proceedings that could change the outcome of the RFP award and they would be powerless to participate. There is little doubt that both the Advocate Program and Court Options have fundamental interests which are affected by the outcome of these proceedings as such, their intervention in these proceedings.

In the final analysis, the participation of the Advocate Program and Court Options had little impact on the outcome of these proceedings and this opinion and recommendation. Their positions were and are in alignment with the Office of the County Attorney and they both adopted the arguments set forth by the County Attorney's office. The County Attorney's position, when juxtaposed against the arguments set forth by MDCS, provided a more than adequate basis to ascertain the facts and render this opinion and make this recommendation.<sup>2</sup>

The protestor was represented by Eduardo Lombard, Esq.; the County Attorney was represented by Oren Rosenthal, Esq. and Suzanne Villano, Esq.; The Advocate Program was represented by H.T. Smith, Esq.; and Court Options was represented by

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<sup>1</sup> Since MDCS is arguing that the entire RFP process in this case was fundamentally flawed and ought to be thrown out, the outcome of these proceedings could completely extinguish the interests of both the Advocate Program and Court Options.

<sup>2</sup> Throughout this Opinion and Recommendation, references to arguments made by the Respondent (County Attorney) and the Intervenors (Advocate Program and Court Options) will generally be attributed to the County Attorney since the arguments made by the Intervenors, while they may have slight

Eduard Lacasa, Esq. All parties had representatives of their respective entities and agencies present at the hearing, however no party called any witnesses and no testimony of any witnesses was taken or solicited.

The Protestor provided the Hearing Officer with a CD of documents as exhibits to its Formal Notice of Protest. The County Attorney submitted a Response with exhibits and on the day of the hearing, the Protestor provided an additional CD of documents as exhibits, which were received by them pursuant to their Public Records Request after their initial submission of the Bid Protest. To the extent that the documents attached as exhibits are part of the public record, they were received into the record as evidence to be considered in this matter. In addition, the Protestor, as part of its presentation, made reference to certain specific documents it used to illustrate specific issues and those documents are attached to the Hearing Transcript of these proceedings as exhibits.

The protestor attempted to enter into evidence, an affidavit of a witness who was not present at the Bid Protest Hearing. The Affidavit purported to assert that there were known problems with the incumbent Advocate Program's operation of the existing Misdemeanor Diversion program and these problems were ignored by the Selection Committee. This affidavit was disallowed and is not considered in the analysis of this Opinion and Recommendation.

First, it was presented for the first time at the Bid Protest Hearing. Second, the information contained within the Affidavit would require this Hearing Officer to draw

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differences in emphasis and interpretation they are not so fundamentally different as to need to be addressed separately.

conclusions as to whether the individual members contemplated the incumbents current operations and why members of the Selection Committee scored a particular bidder a certain way. I am unwilling to attempt to draw any conclusions about the motivation or thought process that went into the scoring.

#### STANDING

Whether MDCS has standing to maintain this protest has been raised in two different contexts. In the first instance, the Intervenor's argue that MDCS should have indicated its objection to their having been eliminated from consideration at the moment they were actually eliminated from consideration. They argue that this point was actually at the time MDCS was not invited to make an oral presentation. MDCS argues that the Miami Dade County Code provides a single point in time at which it could file a protest. That point is after the award and recommendation is issued by the County. Using that as the date that the "clock" begins to run, MDCS' protest was timely filed and whatever vested interest they had in the outcome of these proceedings was maintained up to the point of the Notice of Intent to Award dated November 25, 2013.

In response to a question posed by the Hearing Officer, the County Attorney argued that MDCS had no Standing because the behaviors that MDCA asserts forms the underlying basis for their Bid Protest took place after MDCS was already eliminated from consideration and thus ineligible for the receipt of the award of the bid. Arguing in effect that since MDCS was scored so low in the initial phase of the evaluation of their proposal, they were not invited to make an oral presentation before the Selection

Committee and since Selection Committee had already removed MDCS from consideration MDCS had no more interest in the outcome of the deliberations.<sup>3</sup>

In response, MDCS argues that the information which forms a large portion of the substantive basis for its Bid Protest only became known after MDCS was not invited to make an oral presentation, but took place prior to that point. And that those behaviors of the selection committee evidenced their bias during the earlier part of the selection process and may have been the reason for their low scoring. It would have been impossible to protest something that it had no way of knowing existed.

From a procedural standpoint, I find that the Bid Protest filed by MDCS was timely and keeping with the language of the Miami-Dade County Code. The record indicates that MDCS' Notice of Intent to Protest was filed within the five (5) day period following the issuance of the Notice of Intent to Award. There is nothing either within the language of the RFP itself or the Miami Dade County Code that would require MDCS to submit either a Notice of Intent or an actual Bid Protest prior to the Notice of Intent to Award.

The second issue related to standing is more complicated. The question becomes, whether MDCS was already eliminated from consideration for an award prior to the oral presentations and further, whether that elimination from consideration prevents MDCS from moving forward with this Bid Protest.

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<sup>3</sup> The Advocate Program and Court Options also argue that in order for the MDCS Bid Protest to be timely, MDCS should have raised its issues at the time MDCS was not invited to make an oral presentation.



It is undisputed that MDCS was not invited to make an oral presentation; it is also undisputed that the most generous interpretation of the score sheets submitted by the Selection Committee ranked MDCS well below the top four (4) bidders who were invited to make oral presentations. It was because of this low ranking, MDCS was not among the four bidders invited to continue in the selection process and make an oral presentation.<sup>4</sup>

MDCS challenges the adequacy of the entire process, asserting bias on the part of at least one Selection Committee member and that bias fatally flawed the entire RFP process.<sup>5</sup> While MDCS was not invited to make an oral presentation, they were never informed by the Selection Committee that not being asked to make the oral presentation was considered elimination. (*Hearing Transcript at page 108*). In fact, there appears to be some confusion as to the purpose of the oral presentations and what they meant in the overall scope of the RFP. (*Recording of the 4-15-13 Selection Committee Meeting*).

The County Attorney asserts that MDCS effectively knew it was eliminated because it was not invited to make a presentation.<sup>6</sup> The language contained in the RFP supports this conclusion. Clearly, the most prudent course would be for the County to

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<sup>4</sup> The County Attorney, citing *Preston Carroll Company v. Florida Keys Aqueduct Authority*, 400 So.2d 524, 525 (Fla. 3d DCA 1981), asserts that MDCS did not have a substantial interest in the outcome, since it had already been eliminated. "In order to contest the award of a public contract to an apparent low bidder, appellant was required to establish that it had a 'substantial interest' to be established by the agency. A second lowest bidder establishes that interest." *Preston Carroll* at 524.

<sup>5</sup> Questions as to whether "Cone of Silence" or "Sunshine Law" violations occurred are not within the purview of this Hearing Officer to consider. The only question regarding the activities of the Selection Committee is not whether those activities may or may not have violated the Cone of Silence or Sunshine Law, but whether those actions impaired the selection process in such a way as to invalidate the RFP results.

have notified the bidders who were eliminated. The concept of a bidder having to surmise or glean their status from the circumstances surrounding their bid is not consistent with the underlying goals of an RFP or the Bid Selection process. A bidder has the right to have the goals and intentions of the County clearly defined.

The language of *Section 4.3* of the RFP states as follows:

"Upon completion of the technical criteria evaluation indicated above, rating and ranking, the Evaluation/Selection Committee may choose to conduct an oral presentation with the Proposers which the evaluation deems to warrant further consideration based on, among other considerations scores in clusters and/or maintaining competition. (See form A-2 regarding registering speakers in the proposal for oral presentations.) Upon completion of the oral presentations, the Evaluation/Selection Committee will re-evaluate, re-rate and re-rank the proposals remaining in consideration based upon the written documents combined with the oral presentation."  
(See *Section 4.3 of the Request for Proposal*)

The language in the RFP indicates that the failure to be invited to make an oral presentation was the equivalent to elimination from the Bid Process. Section 4.3 begins "Upon completion of the technical criteria evaluation....." This indicates that the first part of evaluation process had ended. Section 4.3 goes on to say that the Selection Committee "may choose" to conduct oral presentations with the proposers..... This suggests that the process could have been concluded without conducting oral

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presentations. Indeed, in the April 15, 2013 meeting of the Selection Committee, Pearl Bethel, the County Contracting Officer explains to the Selection Committee, that the oral presentations were not a mandatory part of the RFP, but optional to the Selection

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<sup>6</sup> Court Options takes this position as well, arguing that the context and the circumstances surrounding MDCS not being invited to make an oral presentation should have provided MDCS with sufficient notice that it had been eliminated. (*Hearing Transcript at page 111*).

Committee and the presentations were primarily for clarification purposes.<sup>7</sup> The mandatory language of this Section 4.3 appears once the oral presentations occurred, then the Selection Committee "will re-evaluate, re-rate and re-rank the proposals remaining in contention based upon the written documents combined {emphasis added} with the oral presentation. The clear implication is that without participating in the oral presentations, a bidder could not be included in this component of the evaluation process since combining the oral presentation was mandatory to the next level of scoring.

The County could not have materially altered or ignored the language of the RFP, making an evaluation of the oral presentations a mandatory part of the final scoring once they occurred. The Selection Committee was bound to follow the rules as set forth in the bid documents. While the County has wide discretion in exercising its judgment over the contracting decisions, as a public body, the County is not entitled to omit or alter material provisions required by the RFP because in doing so the public body fails to "inspire public confidence in the fairness of the [RFP] process." *State, Dep't of Lottery v. Gtech Corp.*, 816 So.2d 648 (Fla. 1st DCA 2001). The rules in this case as articulated in the RFP, eliminated MDCS from further consideration, therefore making MDCS ineligible to receive the award.

Based upon the language of the RFP, I find that whatever interest MDCS had in the outcome of the Bid Selection process was extinguished as of the moment they were not invited to make an oral presentation. At the point of the oral presentations, the second part of the selection process involved only those bidders who were invited to

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<sup>7</sup> See recording of April 15, 2013 meeting of the Selection Committee.

make oral presentations. The failure to be invited to make an oral presentation, based upon the language of the RFP, meant that MDCS could not have been included in the mandatory re-scoring required under Section 4.3 of the RFP.<sup>8</sup>

However, since their challenge to the outcome of the bid process was not related to the scoring or ranking, but rather to the process itself, MDCS' interest as a bidder does give them standing to assert that the selection process was flawed. I agree with MDCS that a challenge to the selection process as a whole gives them the right to protest the outcome of the bid. As an unsuccessful bidder, if MDCS were to argue that they should be awarded the bid, it would require that MDCS assert that the higher ranked bids were inferior to their bid and MDCS should have been ranked high enough to be awarded the bid. *Capelletti Brothers, Inc. v Department of General Services*, 432 So.2d 1359, 1362. MDCS does not take this position.

#### UNFAIR AND FATAL FLAWED PROCESS

The issue of bias being interjected into the selection process involves MDCS' contention that Judge Tom Peterson, a voting member of the Selection Committee, unfairly favored the Advocate Program.<sup>9</sup> Judge Peterson made clear he preferred a single provider for the entire program and he preferred that the provider be a non-profit entity. (See *Judge Peterson May 6, 2013 letter and Memorandum*). It should be noted

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<sup>8</sup> The impact of the re-evaluation and re-ranking is apparent in that the Advocate Program was ranked second before the oral presentations and first after the oral presentations.

<sup>9</sup> There was some vague assertion regarding Judge Peterson's involvement as a founder of the Advocate Program. I accept the representation of the County Attorney that Judge Peterson has never had any involvement with the corporate entity, The Advocate Program which has intervened in this matter. Judge Peterson was one of the founders of the court system's advocate program.

that his undated Memorandum was directed to "Court Administration" and not to any party involved in the RFP Selection Process.

I do not think it reasonable to expect that any member of the Selection Committee who has had experience with the existing misdemeanor diversion program could completely overlook and ignore information they are personally aware of and experiences they have had with an incumbent provider, in their evaluation. This prior knowledge alone is not evidence of bias. Incumbency cuts both ways and is not in and of itself a predictor of a positive evaluation or ranking. The prior experiences can be positive and negative.

MDCS suggests that the April 20, 2013 letter from Judge Peterson evidences a bias in favor of the Advocate Program and against them as a for profit corporation. A review of Judge Peterson's communications and his open articulation of his preferences and priorities, are more in line with expressing concerns about issues he raised with having a certain type of vendor perform the work. (*See Judge Peterson Letter dated May 6, 2013*).<sup>10</sup> This is quite different than championing the cause of a specific vendor.

Every selection committee member either has a personal preference or is inclined to think a certain way about the evaluation criteria. One of the reasons the members of selection committee are chosen is because of their knowledge and experience of the issue covered by the RFP. Besides inferences that MDCS is asking me to draw, there is nothing in Judge Peterson's expressing his preferences for certain qualities and qualifications he

believes a successful bidder ought to have that evidences a bias towards a particular vendor.

Judge Peterson's score sheets, which are in the record, are consistent with the other members of the Selection Committee. While MDCS argues that this is evidence of Judge Peterson's undue influence over the other members of the Selection Committee, in order to order to accept that supposition, I would have to assume that the other members of the Selection Committee, which include members of the Office of the State Attorney, are so easily swayed as to be incapable of independent thought. I decline to make this assumption.

#### CONCLUSION

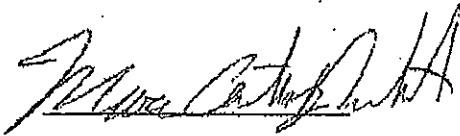
In the final analysis, in the absence of a finding that awarding the bid to the Advocate Program and Court Options is arbitrary and capricious, the award must be upheld. *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So.2d 505, 507 (Fla. 1982); *Scientific Games, Inc. v. Dittler Bros., Inc.*, 586 So.2d 1128, 1131 (Fla. 1st DCA 1991) Even given the difficulties that were attendant to this RFP selection process, I find that the result of the selection process and subsequent award to the Advocate Program and Court Options was consistent with the requirements of the RFP. This certainly was not the perfect RFP selection process. However, I cannot find that Judge Peterson or anyone else involved in the process did anything improper with respect to the matters that are before me. A Perfect RFP selection process is not required. The County did not act

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<sup>10</sup> The target of most of Judge Peterson's attention appears to be Court Options. As a bidder who was the recipient of an award, Court Options concerns raised in their May 21, 2013 letter were not pursued and

fraudulently, arbitrarily, illegally or dishonestly. *Department of Transportation v. Groves-Watkins Constructors*, 530 So.2d 912, 914 (Fla. 1988). As such, whatever the actions were that contributed to the imperfections were not of such a magnitude as to create a selection process which was fatally flawed and anti-competitive.

Based upon the law and the facts brought forth in these proceedings the undersigned Hearing Officer recommends that the Notice of Intent to Award dated November 25, 2013 be upheld and that the bid for RFP 851-Misdemeanor Diversion Services be awarded to the Advocate Program and Court Options.



Hearing Officer

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their concerns apparently alleviated. (See *Bid Protest hearing transcript at page 134*).

CLERK OF THE  
BOARD OF COUNTY COMMISSIONERS  
MIAMI-DADE COUNTY, FLORIDA

In re: Bid Protest of Miami Dade Community  
Services, Inc.,  
Misdemeanor Diversion Services  
RFP #851

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**MIAMI-DADE COUNTY'S MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
MEMORANDUM IN OPPOSITION TO  
MIAMI DADE COMMUNITY SERVICES INC. BID PROTEST**

Miami Dade Community Services Inc. ("MDCS"), the fifth ranked proposer out of six, filed the instant bid protest to Request for Proposal No. 851, Misdemeanor Diversion Services ("RFP") based on the utterly unsupported proposition that a Senior County Court Judge with decades of experience and knowledge in the types of services being procured is unable to serve as an impartial selection committee member. Whether couching its argument as hypothetical bias against for-profit companies (a premise disproved by the recommendation to award a contract to a for-profit company) or a perceived violation of state and Miami-Dade County ("County") rules, MDCS cannot escape the very simple fact that even if Judge Peterson's scoring was thrown out and not considered, MDCS would still have ranked so low that it would not have been invited to contract with the County or even participate in oral presentations. Moreover, MDCS' proposal was so far outside the range of consideration that MDCS lacks the standing to challenge the procurement as a whole or, more particularly, any acts that occurred after it was eliminated from the process.

As such, MDCS fails to meet its high burden of demonstrating that the County Mayor acted "fraudulently, arbitrarily, illegally, or dishonestly" in recommending award to the top two



proposers: Advocate Program, Inc. and Court Options, Inc. *See, e.g., Dept' of Transp. V. Groves-Watkins Constructors*, 530 So2d 912, 914 (Fla. 1988) ("the hearing officer's sole responsibility [in reviewing a protest] is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly").

### **Background**

On January 28, 2013 the County Mayor appointed an Evaluation/Selection Committee ("Committee") for RFP 851 consisting of Pearl Bethel, Internal Services Department (non-voting chairperson), Don Horn (Assistant Chief, State Attorney's Office), Joe Mansfield (Chief County Court, State Attorney's Office), Ted Mannelli (Executive Director, State Attorney's Office), Tom Petersen (Retired Judge), and Kimberly Redmon-Jones, (Miami Dade Police Department). *See* January 28, 2013 Memo from Mayor, Appointment of Selection Committee for the SAO (attached hereto as Exhibit A).<sup>1</sup>

On March 1, 2013 Miami Dade County released RFP No. 851 Misdemeanor Diversion Services ("RFP") to provide Misdemeanor Diversion Services for the Miami-Dade Office of the State Attorney, Eleventh Judicial Circuit ("SAO"). *See* Recommendation for Approval to Award Contract No. RFP851: Misdemeanor Diversion Services filed November 25, 2013 ("Recommendation") (attached hereto as Exhibit B). The RFP sought firms to administer misdemeanor diversion services for offenders in the Criminal and Traffic Divisions of the Eleventh Judicial Circuit County Court. *Id.* The County anticipated awarding up to three contracts for a three year period. *See* RFP Misdemeanor Diversion Services at page 2 (attached hereto as Exhibit C).

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<sup>1</sup> Ted Mannelli later became a non-voting technical advisor and was replaced by Carmon Jones.

On March 29, 2013, six proposals were received in response to the RFP. *See* Recommendation Exhibit B. On April 12 and April 15, 2013 the Committee held two Kick-off meetings. On May 3, 2013 the Committee scored and ranked the proposers as follows:

1 <sup>st</sup> place:	Advocate Program	493.75 points
2 <sup>nd</sup> place:	National Corrective Group	443.3 points
3 <sup>rd</sup> place:	Court Options	441 points
4 <sup>th</sup> place:	Judicial Correction Services	411.70 points
5 <sup>th</sup> place:	Miami Dade Community Services	364 points
6 <sup>th</sup> place:	Professional Probation Services	297.7 points

*See* Pre-Orals scoring (attached hereto as Exhibit D).

The Committee reviewed the rankings and short-listed the proposers requesting to hear oral presentations from only the four highest-ranking bidders. These four short-listed proposers consisted of both not for profit and for profit companies. MDCS, as the fifth place proposer, was not selected to proceed to oral presentations and was eliminated from the selection process at that time.

After oral presentations, the selection committee recommended the two highest ranked firms, Advocate Program and Court Options, for the award. Consistent with this recommendation, the Mayor recommended that the Board of County Commissioners approve award of RFP 851 Misdemeanor Diversion Services to Advocate Program, Inc. and Court Options, Inc.

### **Argument**

A bid protest may only be sustained if the County Manager acted "fraudulently, arbitrarily, illegally, or dishonestly" in recommending a vendor to the County Commission for award. *Dept' of Transp. V. Groves-Watkins Constructors*, 530 So.2d 912, 914 (Fla. 1988) ("the hearing officer's sole responsibility [in reviewing a protest] is to ascertain whether the agency

acted fraudulently, arbitrarily, illegally, or dishonestly"). The hearing examiner's sole responsibility is to determine if the recommendation was the result of "illegality, fraud, oppression, or misconduct," or that the recommendation and award was arbitrary or capricious. *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So.2d 505, 507 (Fla. 1982).

In determining whether the County's action was arbitrary, the test is "whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, or showing that the award decision has no rational basis." *Banknote Corporation of America, Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (citing *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)). MDCS as the disappointed proposer and protestor here bears a heavy burden of showing that the award decision had no rational basis.

Here, MDCS can not meet this high standard because: (1) MDCS lacks standing to raise the bid protest as it was not on the short-list of proposers to proceed to oral presentations and was a low ranking proposer; (2) there was no improper bias of the selection committee individually or collectively towards any proposer; and (3) neither the cone-of-silence or Florida's Sunshine laws were violated and, even if they were, such violations are not properly the basis of a bid protest.

#### **I. MDCS LACKS STANDING TO RAISE A BID PROTEST**

First, MDCS's bid protest must be dismissed for lack of standing, or in the alternative denied. MDCS has not alleged facts that entitle it to obtain judicial review because it does not have a personal stake in the outcome of the controversy. *See Sierra Club v. Morton* 405 U.S. 727, 731-732, 1972. (First question presented is whether the Sierra Club has alleged facts that entitle it to obtain judicial review of the challenged action...the question of standing depends on whether the party has alleged such a "personal stake in the outcome of the controversy"). *See*

also *Preston Carroll Company v. Florida Keys Aqueduct Authority*, 400 So.2d 524, 525 (Fla. 3d DCA 1981). In order to contest the award of a public contract to an apparent low bidder, [the unsuccessful bidder]..was required to establish that it had a substantial interest to be determined by the agency. "A second lowest bid establishes that substantial interest...[but a] third low bidder, was unable to demonstrate that it was substantially affected; and it therefore lacked standing to protest the award of the contract to the low bidder." *See id.*

Similarly, as the fifth ranked proposer eliminated before oral presentations, MDCS cannot demonstrate that it was substantially affected by any actions that occurred after the initial evaluation. MDCS did not receive an invitation to participate in oral presentations because the Committee unanimously selected only the top four vendors to oral presentations and MDCS ranked too low for inclusion. Composite scores post-oral presentations ranked Judicial Correction Services third and National Corrective Group fourth. The scoresheet for post oral presentation did not include MDCS or the sixth ranking bidder. *See Exhibit E.* The exclusion of MDCS and the sixth ranking vendor from the scoresheet during the oral presentations, clearly demonstrate that MDCS was no longer under consideration by the Committee to receive the award. *See Post-Orals Composite Scoresheet (attached hereto as exhibit E).* Simply put, after the Committee short-listed the proposers and excluded MDCS, it had no expectation of receiving the award and no substantial interest to protect in RFP 851 after that point. As such, MDCS does not have standing to raise this issue because a proposer "who is not and cannot potentially be a party to the contract with the public body, is not entitled to the relief of either an award of the contract, or a rebid." *Brasfield & Gorrie General Contractor, Inc. v. Ajax Construction Company, Inc.*, 627 So.2d 1200, 1203 (Fla. 1<sup>st</sup> DCA 1993) (citing *Ft. Howard Co v. Department of Management Services*, 624 So.2d 783 (Fla. 1<sup>st</sup> DCA 1993)); *See also, Intercontinental*

*Properties v. State of Florida Department of Health and Rehabilitative Services, Coliseum Lanes, Inc.*, 6060 So. 2d 380 (Fla. 3d 1992).

## **II. The Selection Process Was Not Tainted By Bias**

MDCS attempts to use the comments and scoring of a sole Committee member to confuse what was a proper process and rational decision. Selection Committee members are chosen based on their knowledge and experience in the field and expected to review all proposals with a critical eye, voice their opinions, engage in relevant discussions and offer guidance to all Committee members. Committee selection member and retired Senior County Court Judge Tom Petersen acted in accordance with his duties and responsibilities to the Committee. The SAO nominated Judge Petersen to serve on the Committee due to his experience with misdemeanor diversion services for the past three decades both as a prosecutor and a judge. MDCS relies on the unbelievable proposition that the Committee was prejudiced simply because the Committee members expressed their honest opinions in evaluation of the company and its proposal. Simply put, Judge Petersen was a wealth of knowledge for this RFP. MDCS's specific allegation that "Judge Peterson showed his bias by championing Advocate Program ...and announced his intent to penalize Court Options for profit concerns" is not supported by the facts in this case and has nothing to do with how MDCS was evaluated.

Moreover, after the pre-oral review, Judge Petersen issued his second highest score to Court Options (a for-profit firm) and subsequently ranked Court Options second. It stands to reason that Judge Petersen did not penalize Court Options when he ranked it as the second highest vendor and ultimately recommended it to receive the award. For argument sake however, even if Judge Petersen calculations are deducted from the pre-oral composite Committee results,

the ranking and relative score differential still remain fairly similar and Court Options ranks third:

1 <sup>st</sup> place:	Advocate Program	393.75 points
2 <sup>nd</sup> place:	National Corrective Group	378.3 points
3 <sup>rd</sup> place:	Court Options	371 points
4 <sup>th</sup> place:	Judicial Correction Services	351.7 points
5 <sup>th</sup> place:	Miami Dade Community Services	304 points
6 <sup>th</sup> place:	Professional Probation Services	257.7 points

Critically, however, MDCS's ranking among the proposers does not change in any material way. Simply put, MDCS was properly evaluated as second to last and outside the zone of consideration for oral presentations.

Additionally MDCS alleges that "Advocate Program's high scores were unsupported by its history as the incumbent provider, which has been marked by poor performance" and "evidence of this past performance is readily available to the SAO." *See, generally*, Bid Protest. This argument is completely without merit as the Committee was overwhelmingly represented by the SAO. *See* Exhibit A. The RFP was drafted in consultation with the SAO, the SAO replied to all technical questions during the RFP and at least two of the five voting Committee members were full-time managing attorneys with the SAO (Joseph Mansfield and Don Horn). Past performance, relevant experience and qualifications were selection criteria evaluated by all members. *See* Exhibit D, Exhibit E. During the pre-oral evaluation meeting on May 3, 2013, representatives from the SAO issued a nearly perfect score when evaluating past performance for the Advocate Program (Don Horn awarded the maximum (35 points) while Joseph Mansfield awarded 34 points). *See* Exhibit D. Suffice it to say, the SAO was pleased with the past performance of the Advocate Program.

Moreover, even if the reasonable people may disagree as to whether Advocate Program merited such high consideration from the selection committee, that disagreement may not form the basis of a bid protest. *See, e.g., Miami-Dade County v. Church and Tower, Inc.*, 715 So. 2d 1084, 1089 (Fla. 3<sup>rd</sup> DCA 1998) ("So long as such a public agency acts in good faith, even though they may reach a conclusion on facts upon which reasonable men may differ, the courts will not generally interfere with their judgment, even though the decision reached may appear to some persons to be erroneous."); *See also Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982). Requesting that a hearing examiner re-evaluate the relative merits of a proposer violates a core tenet of bid protest hearings where, "the hearing officer's sole responsibility [in reviewing a protest] is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly." *Dep't of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 914 (Fla. 1988). MDCS's argument that they should have been scored higher, or that others should have been scored lower, is the time-worn refrain of the losing proposer which the Courts and hearing examiners are bound to reject.

**III. The Cone-of-silence and Florida's Sunshine laws were not violated and are not properly the basis of a bid protest.**

MDCS argues that Judge Peterson violated both the Cone of Silence and Florida's Sunshine Laws. As more fully described below, this is simply not true. Moreover, even if this were true, such violations have either been cured or are irrelevant to the ultimate conclusion reached by the Committee. Finally, any alleged violations of the Cone of Silence or Florida's Sunshine Laws are more properly considered by other agencies and not a hearing examiner in a bid protest.

**A. Neither the Cone of Silence nor Florida's Sunshine Laws Were Violated by Judge Peterson's Initial E-mails**

On April 22, 2013, Pearl Bethel received an email from Judge Petersen's assistant containing two attachments: 1) a letter to Pearl Bethel from Judge Petersen and 2) a proposed memo drafted by Petersen (not circulated amongst Committee members). On May 3, 2013 the Committee held a duly noticed and recorded evaluation meeting in accordance with the Sunshine Law. During the meeting, the Committee discussed, rated and ranked the six proposals based solely on technical criteria set forth in the RFP. Ms. Pearl Bethel advised Judge Peterson that the Cone of Silence precluded communication amongst committee members outside a publicly noticed meeting. Judge Petersen acknowledged that his letter sought to address concerns with the RFP as released but that he waived his rights to timely object to the RFP as issued. Committee members were further instructed to evaluate the proposals based on the technical criteria set forth in the RFP. Judge Petersen's letter predated the evaluation/selection meeting and did not pertain to selection but to the solicitation itself. Judge Peterson admitted that it was a "moot issue" as it was not raised within the appropriate time period. None of these actions rise to the level of a violation of either the Cone of Silence or the Sunshine Laws. No conversation occurred among and between the selection committee members outside of a publicly noticed meeting on this topic which, in fact, is actually collateral to any decision that the Selection Committee was actually empanelled to hear.

**B. Any Acts After MDCS Was Eliminated Can Not Form the Basis of a Protest**

As discussed above, any acts which occurred during the solicitation process after MDCS was eliminated cannot form the basis of its bid protest. To the extent MDCS raises the issue of a pre-oral presentation meeting, such meeting did not make a single decision to which MDCS has



any cognizable interest. MDCS was not even present for the oral presentations as they had no definable interest in the proceeding after they were eliminated.

**C. Any Alleged Sunshine Law Violation was Cured**

Even if MDCS could raise the events which occurred prior to the oral presentations, which they cannot, and even if such events were improper under Florida's Sunshine laws, which they are not, any possible violation was cured by re-conducting the oral presentations and pre-meeting in public. Immediately prior to the oral presentations on May 22, 2013, the Committee held a brief discussion regarding scheduling of the oral presentations that was not recorded due to inadvertent oversight by a non-voting selection committee meeting. Government in the Sunshine guarantees "that no...formal action shall be considered binding except as taken or made at an open meeting." See *Fla. Stat.* 286.011.<sup>2</sup>

As an initial matter, failure to record the pre-oral discussion prior to the oral presentation meeting does not violate the Sunshine Law. Even if it did, however, such violation was cured by reconvening the meeting. Following the meeting on May 22, 2013, the non-voting Committee chairperson consulted with the County Attorney's Office and the Ethics Commission to seek an opinion.<sup>3</sup> The Ethics Commission staff informally determined that, in an abundance of caution, the meeting should be re-held in the Sunshine in its entirety to cure any potential for violation. On June 17, 2013 the Committee re-heard oral presentations, re-conducted the

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<sup>2</sup> Even if this failure violated the Code, such failure has no consequence, as the failure to tape record a meeting "shall not effect the validity of any ...recommendation or other action, nor provide the basis for any person to protest or challenge the recommendation." See Miami Dade Florida, Code Sec. 2-8.1.f.1.

<sup>3</sup> The Commission on Ethics has exclusive jurisdiction over the Cone of Silence under the County Charter and the County Code. See Miami-Dade County Home Rule Charter Citizen's Bill of Rights at ¶ 17 ("the county shall, by ordinance, establish an independent Commission on Ethics and Public Trust ...with the authority to review, interpret, render advisory opinions and enforce the county and municipal code of ethics ordinances."); See also Code of Miami-Dade County § 2-11.1 (the Commission on Ethics jurisdiction "shall automatically extend to...advisory personnel....who are required to comply with the Code of Ethics Ordinance").

meeting fully in compliance with the Sunshine Laws, and evaluated and ranked the four highest ranking bidders.

It is well-settled that Sunshine Law violations “can be cured by independent, final action completely in the Sunshine.” *Brucker v. City of Dania Beach*, 823 So. 2d 167, 171 (Fla. 4<sup>th</sup> DCA 2002); *see also*, *Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1<sup>st</sup> DCA 1985).<sup>4</sup> The July 17, 2013 meeting cured the sunshine law violation after the Committee heard oral presentations, questioned the proposers, discussed the presentations, rated and ranked all remaining vendors. *See B.M.Z. Corporation v. City of Oakland Park*, 415 So2d 735 (Fla. 4<sup>th</sup> DCA 1982) (where no evidence that any decision was made in private, subsequent formal action in sunshine was not merely perfunctory ratification of secret decisions or ceremonial acceptance of secret actions). As such, to the extent any violation of the Sunshine Law occurred it was cured by the subsequent meeting on July 17, 2013.

### Conclusion

MDCS cannot demonstrate that the County acted fraudulently, arbitrarily, illegally or dishonestly in recommending the contract awards to the proposers with the highest scores. Nor can MDCS show that it has any interest in the solicitation after it had been eliminated. Absent these showings, the protest must fail. Accordingly, the County respectfully requests that the Hearing Examiner deny the bid protest and fully affirm the County's recommended contract award for Request for Proposal No. 851, Misdemeanor Diversion Services.

Respectfully submitted,

R.A. CUEVAS, JR.  
Miami Dade County Attorney  
Stephen P. Clark Center  
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Miami, Florida 33128

By: /s/Suzanne Villano  
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orosent@miamidade.gov

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via electronic mail this 20<sup>th</sup> day of December, 2013 to:

Judge Marc Anthony Douthit, Hearing Examiner (EMAIL)

Eduardo S. Lombard ([elombard@vplaw.com](mailto:elombard@vplaw.com))  
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Attorney for MDCS

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Attorney for Court Options

Assistant County Attorney Oren Rosenthal

Miami-Dade County Clerk of the Board of County Commissioners ([clerkbcc@miamidade.gov](mailto:clerkbcc@miamidade.gov))

Fara Diaz, Clerk of the Board ([Farad@miamidade.gov](mailto:Farad@miamidade.gov)).



## MEMORANDUM

TO: LISTED DISTRIBUTION

DATE: December 5, 2013

FROM: Christopher Agrippa, Director  
Clerk of the Board Division

SUBJECT: Bid Protest -- RFP No. 851  
Misdemeanor Diversion Services

Pursuant to Section 2-8.4 of the Code and Implementing Order 3-21, Bid Protest Procedures, a bid protest has been filed with the Clerk of the Board Division on December 2, 2013, in connection with the foregoing Contract. The protest was filed by Attorney Eduardo S. Lombard, representing Miami Dade Community Services, Inc.

A filing fee in the amount of \$5,000.00 was submitted with the bid protest.

If you have any questions pertaining to this protest, please contact Fara C. Diaz at (305) 375-1293.

CA/fcd

Attachments

DISTRIBUTION:  
Board of County Commissioners (via email)  
Honorable Carlos A. Gimenez, Mayor, Miami-Dade County (via email)  
Alina F. Hudak, Deputy Mayor/County Manager (via email)  
R. A. Cuevas, County Attorney (via email)  
Hugo Benitez, Assistant County Attorney (via email)  
Oren Rosenthal, Assistant County Attorney (via email)  
Janelle Snyder, County Attorney's Office (via email)  
Rita Gonzalez, County Attorney's Office (via email)  
Glenn Bass, County Attorney's Office (via email)  
Charles Anderson, Commission Auditor (via email)  
Elizabeth Owens, BCC Legislative Analyst, Commission Auditor's Office (via email)  
Hester Sola, Director, Internal Services Department (via email)  
Edward Marquez, Deputy Mayor, (via email)  
Miriam Singer, CPPO, Assistant Director, Internal Services Dept. (via email)  
Amos Roundtree, Director, Purchasing Department, Internal Services Dept. (via email)  
Wallor Fogarty, Manager, Procurement Vendor Services, Internal Services Dept. (via email)  
Ray Baker, Assistant to the Director, Internal Services Dept. (via email)  
Paul P. Balhel, Procurement Contracting Officer 2, Internal Services Dept. (via email)

LAW OFFICES

**VEZINA, LAWRENCE & PISCITELLI, P.A.**

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climbard@vlplaw.com

December 5, 2013

**VIA HAND DELIVERY**

Clerk of the Board  
Miami Dade County Board of County Commissioners  
Stephen P. Clark Center  
111 NW 1st Street, 17th Floor, Suite 202  
Miami, Florida 33128-1983

CLERK OF THE BOARD  
2013 DEC -5 PM 3:57  
MIAMI DADE COUNTY FLA.

Re: **Miami Dade Community Services, Inc.'s Protest Petition**  
**Request for Proposals No. 851**  
**Misdemeanor Diversion Services**

Dear Clerk:

Miami Dade Community Services, Inc. ("MDCS"), submits this protest of the recommended award under Request for Proposals No. 851, Misdemeanor Diversion Services, published on November 25, 2013, based on the County's actions taken during the procurement of this RFP. MDCS timely submitted a Notice of Intent to Protest and the required filing fee on December 2, 2013. As required by the County's protest procedures, documentary evidence supporting MDCS's protest is attached to this petition on a CD.

MDCS contends that the entire procurement process was tainted by an Evaluation/Selection Committee member's apparent bias toward one vendor and by Sunshine Law and possibly Code of Silence violations. The Committee's actions violate Florida law and Miami Dade County policy and require rejection of all proposals.

MDCS's efforts to prepare this protest petition have been hampered by the County's and the State Attorney's Office's failure to provide requested documents relating to the RFP. MDCS submitted its first public records request in June 2013 and after more than five months has yet to receive all requested documents. Additional public records requests have been made both to the SAO and to the County after MDCS was notified of the recommended award on the eve of the Thanksgiving holiday. Those requests also remain outstanding. Accordingly, MDCS reserves the right to amend this petition to assert additional and/or different bases for protest once the SAO and County produce all public records and MDCS has had a meaningful opportunity to review the records.

### The RFP

The County, on behalf of the State Attorney's Office, Eleventh Judicial Circuit, issued the RFP in March 2013 seeking proposals from capable and qualified entities for the purpose of providing Misdemeanor Diversion Services for eligible offenders in the Criminal and Traffic Divisions of the Miami-Dade County Court. The selected provider(s) would provide management and supervision services for eligible offenders diverted from prosecution. The County's intent was to award up to three contracts for a three-year period, with one-year options to renew at the County's sole discretion. The County issued three addenda to the RFP, providing responses to provider questions. In Addendum 3, issued March 22, the County stated that a provider's designation as a non-profit entity was not a relevant factor in proposal evaluation. (See Add. 3, #15).

The RFP provided that responsive proposals would be evaluated by an Evaluation/Selection Committee comprising County and SAO personnel and members of the community purporting to have appropriate experience and/or knowledge. The Committee was to evaluate and rank proposals based on criteria set forth in the RFP, including:

1. the vendor's relevant experience, qualifications, and past performance (35 points);
2. relevant experience and qualifications of key personnel, including key personnel of subcontractors, that will be assigned to the project, and experience and qualifications of subcontractors (30 points);
3. the vendor's approach the providing the services requested in the RFP (25 points); and
4. the vendor's financial capability (10 points).

After ranking the proposals, the Committee had the option of conducting oral presentations with those vendors the Committee deemed to warrant further consideration. The Committee would then evaluate, score, and rank proposals and submit the results and a recommendation to the County Mayor or designee for award.

### The Evaluation and Award Processes

MDCS timely submitted a responsive proposal, which the Committee ranked fifth among the six proposals submitted. The County did not invite MDCS to give an oral presentation. As explained below, however, all proposals must be rejected as the entire process was tainted by a Committee member's bias toward one vendor and by multiple Sunshine Law and possibly Code of Silence violations.

One of the vendors for the RFP - and, ultimately, one of the two recommended awardees - was Advocate Program, Inc., a non-profit entity. At some point during the procurement process, Selection Committee Member Tom Petersen sent a memorandum to other Committee members attempting to convince them to recommend an award to Advocate Program. Notwithstanding that the RFP - and all permissible criteria by which proposals could be evaluated - already had

been released, Petersen contended in this memorandum that an award to a non-profit entity was preferable to an award to any for-profit entity, based on his view of who would benefit most from funds the awardee earned. Not only was Petersen's memorandum a manifestation of his partiality and inappropriate, but it was based on faulty reasoning. In addition to revealing Petersen's impermissible predisposition toward recommending an award to Advocate Program, the memorandum violated Sunshine Law and possibly the Cone of Silence policy notwithstanding the inclusion of a disingenuous statement that the memorandum was consistent with Sunshine Law and possibly the Cone of Silence.

Petersen all but called out Advocate Program as *the* vendor that should be recommended. In one of these letters, also addressed to the County Procurement Manager, Petersen questioned the profit distribution of vendor Court Options, Inc. (which, after threatening a protest based in part on the same issue, was recommended for award), and requested that the County Auditor audit Court Options. Petersen contended that such an audit was necessary to answer "questions [that] are essential to correctly respond to each of the four selection criteria that have been provided to us [in the RFP]." However, profit distributions were not part of the RFP criteria, let alone even mentioned in the RFP. Neither was the issue of whether a vendor was too profitable, another concern Petersen expressed. This letter, too, included disingenuous statements attempting to disclaim the fact that the letter violated Sunshine Law and possibly the Cone of Silence.

When the Committee met on May 3 to discuss the proposals received, Petersen once again showed his bias by championing Advocate Program as the sole vendor for award recommendation. Although the Procurement Manager warned against it, Petersen announced his intent to penalize Court Options during his evaluation unless his profit concerns were addressed. Further, it seems Petersen may have convinced Committee member Kimberly Redmon-Jones to do likewise. At this meeting Petersen also mentioned other inappropriate procurement-related communications between himself and the INS, Court Administration staff, and other Committee members.

On May 21, counsel for Court Options submitted a lengthy letter to the County pointing out some of the serious flaws in the RFP's procurement.<sup>1</sup> On May 22, the Committee held its second meeting, where the first oral presentations for the RFP were made. Before the presentations, the County held a private meeting - one that MDCS requested to be allowed to attend but was refused. Correspondence during this period from Petersen to the County Procurement Manager effectively admits that Sunshine Law violations had occurred. On July 17, the Committee held its third meeting, re-holding oral presentations. This was a perfunctory, ministerial meeting intended to cure the County's Sunshine Law violations. That the County held this meeting effectively is the County's admission that violations occurred.

The "cure" was ineffective, however, as the same result obtained: Petersen's scoring blatantly showed a predilection to award to Advocate Program, and Advocate Program was recommended for award. Petersen's proposal scoring for all vendors other than Advocate Program was

<sup>1</sup> On information and belief, the Committee ultimately recommended Court Options for award to preempt a Court Options' protest.



untenably low compared to the scores assigned by the other Committee members, and Ms. Redmon-Jones's was no better. Ironically, Advocate Program's high scores are unsupported by its history as the incumbent provider, which has been marked by poor performance and noncompliance. Evidence of this past performance is readily available to the SAO in its internal reports and other data compilations, yet the County failed entirely to examine this information that was germane to the Committee's evaluation of Advocate Program.

On November 25, the County notified vendors that the County Mayor recommended award of contracts under the RFP to Advocate Program and Court Options. As MDCS timely submitted a responsive proposal but was not recommended for award, MDCS has standing to protest the awards.

#### The Committee's Tainted Procurement Process and Sunshine Law/Cone of Silence Violations

The entire procurement process for the RFP was tainted by Petersen's apparent bias. The problem was not just that Petersen wanted only one vendor selected for award, but that he wanted one vendor in particular: Advocate Program. Indeed, Petersen even argued against recommending vendor Court Options for award, but made no mention of other vendors. It is clear that Petersen was fixated on Advocate Program and intended all along to vote for recommending it for award no matter what the proposals revealed. It also is clear that under no circumstances would Petersen fairly evaluate the proposals. Moreover, not only was Petersen predisposed to recommending Advocate Program for award, but he poisoned the well by urging other Committee members to do the same.

Additionally, the entire procurement process was tainted by multiple Sunshine Law and possibly Cone of Silence violations. On multiple occasions Petersen contacted Committee members, the County Procurement Manager, the INS, and Court Administration staff through memoranda and other correspondence about substantive matters relating to the RFP. Additionally, the Committee held a closed meeting held on May 22. None of these violations were cured.

Notably, the County failed to follow its own policy when after the violations occurred the County allowed the same committee to "re-evaluate" proposals for the RFP. The County has a history of constituting a new committee when Sunshine Law or Cone of Silence violations are alleged, as it did in 2007 for RFP 585 (Misdemeanor Probation Services). The County evidently has recognized in the past the problems inherent in permitting the same individuals who committed such violations to remain involved in the procurement and took steps to bring the process in compliance with the law. Yet here the County ignored precedent and allowed the tainted process to continue.

First, this type of bias contravenes basic principles underlying public sector procurement law. The primary purpose of such law is to protect the public by ensuring that the award of public contracts is free from collusion or favoritism. When a public official's partiality toward or

against a particular vendor finds its way into the process, a fair procurement is undermined and the public is placed at risk.

Public sector procurement rules are designed to prevent exactly what the Committee did - *ad hoc* hand-picking of preferred vendors. One way Florida and Miami-Dade County public procurement law protect the public is by requiring contracting officials to publish and adhere to objective award criteria that eliminate the potential for favoritism. To ensure that favoritism cannot influence the outcome of a public procurement, contracting officials are not permitted to alter or amend contract award criteria without apprising all vendors *before* submission of proposals. Vendors are entitled to rely on the published selection criteria, and a winning vendor that meets the material requirements of the solicitation is entitled to the award of the contract. Indeed, a government entity's failure to comply with the solicitation requirements is by definition arbitrary and capricious as such failure calls the integrity of the process into question. Yet here, Petersen and possibly other Committee members let their bias manifest by imposing on the vendors different criteria than those published in the RFP - namely, a criterion regarding the vendors' for-profit or non-profit status. In looking outside the RFP and applying this criterion, Petersen contravened procurement principles, mandating that all proposals be rejected.

Second, Florida's long-standing Sunshine law requires public decisions such as procurement recommendations to be made "in the sunshine," or at a publicly notice meeting. See art. I, § 24(b), Fla. Const.; § 286.011, Fla. Stat. (2013). The prohibition on conducting the decision making process "in the shade" extends to all aspects of the collective inquiry and discussion stages and includes correspondence between board or committee members. Importantly, violations of Sunshine Law render any decision made here, the recommended awards - void *ab initio*. Any resulting contract would be void as well.

The Committee's holding of a perfunctory, ministerial meeting purporting to cure its Sunshine Law violations was insufficient to achieve cure; the documents relating to the procurement and that the Committee's award recommendation was identical the second time around evidence that the violations were not cured. The alleged "cure" actually was a summary, purely ceremonial decision that merely was a perfunctory ratification of decisions that violated Sunshine Law. See § 286.011, Fla. Stat. (2013); *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755 (Fla. 2010); *Tolar v. Sch. Bd. of Liberty Cnty.*, 398 So. 2d 427 (Fla. 1981); *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974).

Finally, the Committee's actions possibly violated the County's own policy imposing a Cone of Silence rule "designed to protect the integrity of the procurement process by shielding it from undue influences prior to the recommendation of contract award." (See Miami-Dade Cnty. Admin. Order 3-27, Jan. 29, 2002) This policy unequivocally bars written communications such as those made by Petersen. Violation of the Cone of Silence policy, as with Sunshine law violations, renders the recommended awards void.

We note that only the state circuit courts have jurisdiction to redress Sunshine Law violations, and MDCS will pursue its remedies there. We raise the Sunshine Law violations here as further evidence of an inherently flawed process that must be commenced anew.

#### Conclusion

The Committee was tasked with conducting an impartial evaluation of the proposals submitted in response to the RFP. Instead, the Committee permitted at least one member's bias toward Advocate Program to affect its recommendation. The Committee also was bound to conduct the procurement in accordance with Florida's Sunshine Law, chapter 286, Florida Statutes, and the County's Code of Silence policy regarding procurements. Rather, the Committee committed and failed to cure multiple violations of these principles. Therefore, MDCS requests that all proposals be rejected and new procurement issued.

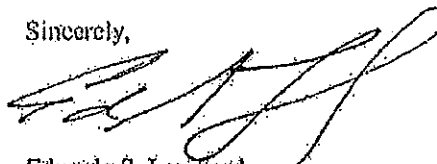
#### Relief Requested

As noted above, the County and SAO have failed to provide documents relating to the RFP and requested by MDCS in public records requests submitted as long ago as June 2013. In this petition and supporting documents, MDCS has made all allegations and provided all information available to MDCS at this time. However, MDCS reserves the right to amend this petition to assert additional and/or different bases for protest once the SAO and County produce all public records and MDCS has had a meaningful opportunity to review the records. MDCS also requests that no hearing be held on this protest until all requested documents have been produced by the County and the SAO and reviewed by MDCS.

At this time, MDCS requests the following relief:

1. That a hearing officer be assigned;
2. That a hearing be held after all requested public records have been made available and MDCS has had a meaningful opportunity to review the records;
3. That the hearing officer recommend rejection of all proposals; and
4. A final decision that all proposals be rejected and the RFP be reissued.

Sincerely,



Eduardo S. Lombard  
Vezina, Lawrence & Piseltelli, P.A.

Miami-Dade Clerk of the Board  
December 5, 2013  
Page 7

cc: R. A. Cuevas, County Attorney (via U.S. Mail)  
Advocate Program, Inc. (via U.S. Mail)  
National Corrective Group, Inc. (via U.S. Mail)  
Court Options, Inc. (via U.S. Mail)  
Judicial Correction Services, Inc. (via U.S. Mail)  
Professional Probation Services, Inc. (via U.S. Mail)